



SMALL BUSINESS ADMINISTRATION

13 CFR Parts 125 and 129

RIN 3245-AH72

Small Businesses in US Territories; Eligibility of the Commonwealth of the Northern Mariana Islands

AGENCY: U.S. Small Business Administration.

ACTION: Direct final rule.

SUMMARY: This direct final rule implements a provision of the National Defense Authorization Act (NDAA) Fiscal Year 2021 (FY 2021) by defining a covered territory business as a small business in the U.S. Virgin Islands, American Samoa, Guam, and the Commonwealth of the Northern Mariana Islands. Covered territory businesses would be newly qualified for surplus personal property distributions, and covered territory mentors would receive contracting incentives for mentoring protégé firms that are covered territory businesses.

DATES: This rule is effective on [INSERT DATE 60 DAYS AFTER DATE OF PUBLICATION IN THE FEDERAL REGISTER], without further action, unless significant adverse comments are received by [INSERT DATE 30 DAYS AFTER DATE OF PUBLICATION IN THE FEDERAL REGISTER]. If significant adverse comment is received, SBA will publish a timely withdrawal of the rule in the *Federal Register*.

ADDRESSES: You may submit comments, identified by RIN 3245-AH72, by any of the following methods:

- Federal eRulemaking Portal: <https://www.regulations.gov>. Follow the instructions for submitting comments.
- Email: Donna Fudge, Procurement Analyst, Office of Policy Planning and Liaison, Small Business Administration, at Donna.Fudge@sba.gov.

SBA will post all comments on <https://www.regulations.gov>. If you wish to submit confidential business information (CBI), as defined in the User Notice at <https://www.regulations.gov>, please submit the information to Donna Fudge, Small Business Administration at Donna.Fudge@sba.gov. Highlight the information that you consider to be CBI and explain why you believe SBA should hold this information as confidential. SBA will review the information and make the final determination on whether it will publish the information.

FOR FURTHER INFORMATION CONTACT: Donna Fudge, Procurement Analyst, Office of Policy Planning and Liaison, Small Business Administration, at Donna.Fudge@sba.gov, (202) 205-6363. If you are deaf, hard of hearing, or have a speech disability, please dial 7-1-1 to access telecommunications relay services.

SUPPLEMENTARY INFORMATION:

I. Background Information

This direct final rule adds the U.S. Virgin Islands, American Samoa, Guam, and the Commonwealth of the Northern Mariana Islands (CNMI) to the list of territories from which small businesses are eligible for preferential treatment under two government programs: the surplus property program and the SBA mentor-protégé program for government contracting. These changes are required by NDAA FY21, Public Law 116-283.

Section 866 of NDAA FY21 defined a “covered territory business” as a small business concern that has its principal office located in one of the following: (1) the U.S. Virgin Islands; (2) American Samoa; (3) Guam; or (4) the CNMI.

Under the law, a covered territory business receives priority for surplus property transfers for four years after the enactment of NDAA FY21, which occurred on January 1, 2021. This direct final rule extends the changes that SBA made in a prior rulemaking about the surplus property program (Use of Federal Surplus Property for Veteran-Owned Small Businesses, and Small Businesses in Disaster Areas and Puerto Rico, 85 FR 69120, effective December 2, 2020). SBA is amending part 129 of its regulations to add a covered territory business to the eligibility

list for the surplus property program, through January 1, 2025. SBA is treating covered territory businesses similarly to businesses located in Puerto Rico: a covered territory business would have its principal place of business located in its respective covered territory. For example, in order for a small business to be considered located in Guam, the small business should have a physical location in Guam..

Additionally, section 866 created two new incentives for SBA's small business mentor-protégé program for mentor-protégé pairs in which the protégé is a covered territory business. First, the mentor would receive positive consideration in its past-performance evaluations. Second, if the mentor incurs costs training the protégé, the mentor is able to apply those costs as subcontracting expenses and count them toward subcontracting goals contained in the mentor's subcontracting plans. These incentives already exist for mentors with protégés that are Puerto Rico businesses.

II. Section-by-Section Analysis

13 CFR 125.1

SBA adds a definition for "covered territory business." A covered territory business is a small business with its principal office located in the U.S. Virgin Islands, American Samoa, Guam, or the CNMI.

13 CFR 125.9

SBA adds a covered territory business to paragraph (b)(3)(ii) so that a mentor-protégé relationship with a covered territory business does not count toward the mentor's limit on the number of protégés. Generally, a mentor is only allowed three protégés at a time. A protégé does not count, however, if the protégé has its principal office located in Puerto Rico or qualifies as a covered territory business.

SBA adds a covered territory business to paragraph (d)(6), which currently lists the special incentives for mentors with a protégé that is located in Puerto Rico. Such a mentor is able

to receive positive consideration for the mentor’s past performance evaluation and applying costs of training the protégé to the subcontracting goals in its subcontracting plan.

13 CFR Part 129

This direct final rule revises the title of part 129 to incorporate the term “covered territory businesses” to align the title with the amendments being made to the part via this rule.

13 CFR 129, Subpart C

This direct final rule changes the title of subpart C, which currently covers Puerto Rico businesses, to incorporate covered territory businesses into the list of small businesses eligible to receive Federal surplus property.

13 CFR 129.301

The direct final rule adds the definition of a covered territory business. Additionally, the direct final rule revises the definition of covered period to specify that, for a covered territory business, the covered period ends on January 1, 2025.

A covered territory business will be able to obtain surplus property from its territory’s State Agency for Surplus Property, in accordance with the same regulations that currently apply to Puerto Rico businesses.

III. Compliance with Executive Orders 12866, 12988, 13132, 13175, 13563, the Congressional Review Act (5 U.S.C. 801-808), the Paperwork Reduction Act (44 U.S.C., Ch. 35), the Regulatory Flexibility Act, (5 U.S.C. 601-612), and the Administrative Procedure Act (5 U.S.C. 553)

Executive Order 12866

The Office of Management and Budget (OMB) has determined that this direct final rule is a not a significant regulatory action for the purposes of Executive Order 12866.

Executive Order 12988

This direct final rule meets applicable standards set forth in sections 3(a) and 3(b)(2) of Executive Order 12988, Civil Justice Reform, to minimize litigation, eliminate ambiguity, and reduce burden. The action does not have retroactive or preemptive effect.

Executive Order 13132

For the purposes of Executive Order 13132, Federalism, SBA has determined that this direct final rule will not have substantial, direct effects on the States, on the relationship between the National Government and the States, or on the distribution of power and responsibilities among the various levels of government. Therefore, for the purpose of Executive Order 13132, SBA has determined that this direct final rule has no federalism implications warranting preparation of a federalism assessment.

Executive Order 13175

This direct final rule does not have tribal implications under Executive Order 13175, Consultation and Coordination with Indian Tribal Governments, because it would not have a substantial direct effect on one or more Indian tribes, on the relationship between the Federal Government and Indian tribes, or on the distribution of power and responsibilities between the Federal Government and Indian tribes.

Executive Order 13563

Executive Order 13563 reaffirms the principles of Executive Order 12866 while calling for improvements in the nation's regulatory system to promote predictability, to reduce uncertainty, and to use the best, most innovative, and least burdensome tools for achieving regulatory ends. The executive order directs agencies to consider regulatory approaches that reduce burdens and maintain flexibility and freedom of choice for the public where these approaches are relevant, feasible, and consistent with regulatory objectives. Executive Order 13563 also requires that regulations be based on the open exchange of information and perspectives among state and local officials, affected stakeholders in the private sector, and the public as a whole. SBA has developed this rule in a manner consistent with these requirements.

While developing this rule, SBA responded to specific inquiries from government officials and the public regarding the implementation of the statutory required changes.

Congressional Review Act

Subtitle E of the Small Business Regulatory Enforcement Fairness Act of 1996 (codified at 5 U.S.C. 801–808), also known as the Congressional Review Act or CRA, generally provides that before a rule may take effect, the agency promulgating the rule must submit a rule report, which includes a copy of the rule, to each House of the Congress and to the Comptroller General of the United States. SBA will submit a report containing this rule and other required information to the U.S. Senate, the U.S. House of Representatives, and the Comptroller General of the United States. A major rule under the CRA cannot take effect until 60 days after it is published in the *Federal Register*. OMB's Office of Information and Regulatory Affairs has determined that this rule is not a “major rule” as defined by 5 U.S.C. 804(2).

Paperwork Reduction Act

SBA has determined that this direct final rule does not impose additional reporting or recordkeeping requirements under the Paperwork Reduction Act, 44 U.S.C., Chapter 35.

Regulatory Flexibility Act

The Regulatory Flexibility Act (RFA), 5 U.S.C. 601, requires administrative agencies to consider the effect of their actions on small entities, small nonprofit enterprises, and small local governments. Pursuant to the RFA, when an agency issues a rulemaking, the agency must prepare a regulatory flexibility analysis which describes the impact of the rule on small entities. However, section 605 of the RFA allows an agency to certify a rule, in lieu of preparing an analysis if the rulemaking is not expected to have a significant economic impact on a substantial number of small entities. The RFA defines “small entity” to include “small businesses,” “small organization,” and “small governmental jurisdictions.”

This Direct Final Rule adds the U.S. Virgin Islands, American Samoa, Guam, and the Commonwealth of the Northern Mariana Islands (CNMI) to the list of territories from which

small businesses are eligible for preferential treatment under two government programs: the surplus property program and the SBA mentor-protégé program for government contracting. This rule relates to small business concerns but would not affect “small organizations” or “small governmental jurisdictions” because the programs affected generally apply only to “business concerns” as defined by SBA regulations; in other words, to small businesses organized for profit. “Small organizations” or “small governmental jurisdictions” are non-profits or governmental entities and do not generally qualify as “business concerns” within the meaning of SBA’s regulations.

SBA identified 219 small business vendors across the covered territories for FY2021 that had sold to the Federal government and therefore would benefit from the changes to SBA’s mentor-protégé program. Based on the number of small business vendors across the covered territories affected, SBA believes that the rule will not have an impact on a substantial number of entities nor a significant economic impact.

Accordingly, the Administrator of the SBA hereby certifies that this rule will not have a significant economic impact on a substantial number of small entities. SBA invites comments from members of the public who believe there will be a significant impact on any small entities, including small businesses.

Administrative Procedure Act – Justification for Direct Final Rule

In general, SBA publishes a rule for public comment before issuing a final rule, in accordance with the Administrative Procedure Act. 5 U.S.C. 553. The Administrative Procedure Act provides an exception to this standard rulemaking process, however, where an agency finds good cause to adopt a rule without prior public participation. 5 U.S.C. 553(b)(3)(B). The good cause requirement is satisfied when prior public participation is impracticable, unnecessary, or contrary to the public interest.

SBA is publishing this rule as a direct final rule because public participation is unnecessary. SBA views this as a non-controversial administrative action because it merely

implements a change required by the Small Business Act, as amended by section 866 of NDAA FY21. This rule will be effective on the date shown in the DATES section unless SBA receives significant adverse comment on or before the deadline for comments. Significant adverse comments are comments that provide strong justifications why the rule should not be adopted or for changing the rule. SBA does not expect to receive any significant adverse comments because the rule simply mirrors the statutory language contained in section 866 of NDAA FY21, with no extraneous interpretation or other expanded text.

If SBA receives significant adverse comment, SBA will publish a notice in the *Federal Register* withdrawing this rule before the effective date. If SBA receives no significant adverse comments, the rule will be effective 60 days after publication without further notice.

List of Subjects

13 CFR Part 125

Government contracts, Government procurement, Reporting and recordkeeping requirements, Small businesses, Technical assistance.

13 CFR Part 129

Administrative practice and procedure, Government contracts, Government procurement, Government property, Reporting and recordkeeping requirements, Small businesses.

For the reasons stated in the preamble, SBA amends 13 CFR parts 125 and 129 as follows:

PART 125-GOVERNMENT CONTRACTING PROGRAMS

1. The authority citation for part 125 continues to read as follows:

Authority: 15 U.S.C. 632(p), (q), 634(b)(6), 637, 644, 657b, 657(f), and 657r.

2. Amend § 125.1 by adding a definition for “Covered territory business” in alphabetical order to read as follows:

§ 125.1 What definitions are important to SBA’s Government Contracting Programs?

* * * * *

Covered territory business means a small business concern that has its principal office located in one of the following:

- (1) The United States Virgin Islands;
- (2) American Samoa;
- (3) Guam; or
- (4) The Commonwealth of the Northern Mariana Islands.

* * * * *

3. Amend § 125.9 by revising the second sentence in paragraph (b)(3)(ii) and revising paragraph (d)(6) introductory text to read as follows:

§ 125.9 What are the rules governing SBA's small business mentor-protégé program?

* * * * *

(b) * * *

(3) * * *

(ii) * * * However, the first two mentor-protégé relationships approved by SBA between a specific mentor and a covered territory business, or a specific mentor and a small business that has its principal office located in the Commonwealth of Puerto Rico, do not count against the limit of three proteges that a mentor can have at one time.

* * * * *

(d) * * *

(6) A mentor that provides a subcontract to its protégé that is a covered territory business, or that has its principal office located in the Commonwealth of Puerto Rico, may:

* * * * *

PART 129-CONTRACTS FOR SMALL BUSINESSES LOCATED IN DISASTER AREAS, AND SURPLUS PERSONAL PROPERTY FOR SMALL BUSINESSES

**LOCATED IN DISASTER AREAS, PUERTO RICO, AND COVERED TERRITORY
BUSINESSES.**

4. The authority citation for part 129 continues to read as follows:

Authority: 15 U.S.C. 636(j)(13)(F)(ii), (iii), and 644(f).

5. Revise the heading for part 129 to read as set forth above.

6. Revise the heading for subpart C to read as follows:

**Subpart C – Surplus Personal Property for Small Businesses Located in Puerto Rico and
for Covered Territory Businesses**

7. Amend § 129.300 by revising the definition of “Covered period” and by adding a definition for “Covered territory business” in alphabetical order to read as follows:

§ 129.300 What definitions are important in this subpart?

Covered period means:

(1) In the case of a Puerto Rico business, the period beginning on August 13, 2018 and ending on the date which the Oversight Board established under section 101 of the Puerto Rico Oversight, Management, and Economic Stability Act (48 U.S.C. 2121) terminates. 15 U.S.C. 636(j)(13)(F)(iii); or

(2) In the case of a Covered territory business, the period beginning on January 1, 2021, the period ending on January 1, 2025. 15 U.S.C. 636(j)(13)(f)(iii).

Covered territory business means a small business concern that has its principal office located in one of the following:

(1) The United States Virgin Islands;

(2) American Samoa;

(3) Guam; or

(4) The Commonwealth of the Northern Mariana Islands.

* * * * *

8. Amend § 129.301 by revising the section heading and paragraphs (a), (b)(1), and (c)(1) introductory text and by redesignating paragraph (f) as paragraph (e).

The revisions read as follows:

§ 129.301 How does a covered territory business or small business concern located in Puerto Rico obtain Federal surplus personal property?

(a) *General.* Pursuant to 15 U.S.C. 636(j)(13)(F)(iii), eligible covered territory businesses may receive surplus Federal Government property from their territory State Agency for Surplus Property (SASP), and eligible small business concerns located in Puerto Rico may receive such property from the Puerto Rico SASP. The procedures set forth in 41 CFR part 102-37 and this section will be used to transfer surplus personal property to eligible small business concerns. The property which may be transferred to the territory SASP or the Puerto Rico SASP for further transfer to eligible small business concerns includes all personal property which has become available for donation pursuant to 41 CFR 102-37.30.

(b) * * *

(1) Be a covered territory business or be located in Puerto Rico;

* * * * *

(c) * * *

(1) Eligible concerns may acquire surplus Federal personal property from their territory SASP or, for a Puerto Rico concern, the Puerto Rico SASP, provided the concern represents and agrees in writing:

* * * * *

Isabella Casillas Guzman,
Administrator.